

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATHANIEL MCCOY-WINSTON,

Plaintiff,

v.

UNITED PARCEL SERVICE, INC.,

Defendant.

Case No. C20-779-MLP

ORDER

I. INTRODUCTION

This matter is before the Court on Defendant United Parcel Service, Inc.’s (“UPS”) Motion for Summary Judgment (“Defendant’s Motion”). (Def.’s Mot. (dkt. # 64).) UPS seeks summary judgment on claims by Plaintiff Nathaniel McCoy-Winston (“Plaintiff”) for wrongful termination, in violation of public policy, and workers’ compensation retaliation, in violation of RCW 51.48.025. (*Id.* at 1-2.) Plaintiff opposed Defendant’s Motion (Pl.’s Resp. (dkt. # 67)) and UPS filed a reply (Def.’s Reply (dkt. # 72)). The Court heard oral argument from the parties on March 1, 2022. (Dkt. # 77.)

Having considered the parties’ submissions, oral argument, the balance of the record, and

the governing law, Defendant's Motion (dkt. # 64) is DENIED, as explained further below.

II. BACKGROUND

A. Factual Background

Plaintiff was employed by UPS as a loader/unloader for approximately eight years.¹ (Hammack Decl., Ex. A (dkt. # 68-1) at 7-10 (McCoy-Winston Dep. at 50:11-16, 50:18-21, 52:2-4, 70:18-25).) As part of his work duties, Plaintiff was required to move packages as they moved toward him on a chute to load them on to UPS trucks. (McCoy-Winston Decl. (dkt. # 70) at ¶ 3.) The chutes require the use of a hydraulic handle to maneuver the chute inside and outside of the UPS trucks. (*Id.* at ¶¶ 3-4.) The hydraulic handles to operate the chutes extend out on to a narrow metal catwalk, which runs along the backdoors of the UPS trucks. (*Id.*)

Per Plaintiff, the equipment, including the chutes, is "well worn and overused." (McCoy-Winston Decl. at ¶ 5.) Plaintiff further notes that the hydraulic chute handles themselves would frequently break and drop down into a lower position than when functioning properly. (*Id.*) Ben Morely and Donald Harper, two of Plaintiff's coworkers, additionally complained of an issue with the hydraulic handles being in a broken lower position and provided letters to UPS outlining the issue.² (McCoy-Winston Decl. at ¶ 7; Hammack Decl., Exs. I (dkt. # 68-9) at 2, J (dkt. # 68-10) at 2.) UPS Mechanic Mark Sullivan testified that he was aware of employee complaints of the chute handles being broken, or down too low, and that this was a result of a

¹ Plaintiff was originally hired by UPS on October 18, 2006, but voluntarily left on September 17, 2007, before being rehired in 2009. (Hammack Decl., Ex. A at 7-8 (McCoy-Winston Dep. at 50:11-13, 50:18-21, 52:2-4).)

² The Court notes that the letters provided by Mr. Morely and Mr. Harper are unsworn documents that appear to have been authored on March 21, 2017, for submission with Plaintiff's grievance through his union. However, the letters were submitted by Defendant with its evidence in support of its Motion (Victorian Decl., Ex. B (dkt. # 65-2) at 1-2) and Defendant did not specifically object to their admissibility or consideration by this Court. *See* Fed. R. Civ. P. 56(c)(2).

1 loss of hydraulic fluid that would need to be periodically added. (Hammack Decl., Ex. F (dkt.
2 # 68-6) at 13-15 (Sullivan Dep. at 39:8-40:10, 43:1-20).)

3 On January 23, 2017, Plaintiff alleges he was injured after exiting the back of a UPS
4 truck during his shift. (McCoy-Winston Decl. at ¶ 7; Hammack Decl., Ex. A at 5, 16-17
5 (McCoy-Winston Dep. at 33:7-13, 125:20-126:3).) Plaintiff alleges that he came off a load stand
6 leading out of a UPS truck while working quickly and that he struck a hydraulic handle
7 extending out into the catwalk with his chest. (*Id.*) At the time of his injury, Plaintiff reported the
8 injury to his floor supervisor but believed he could work through it and that it would otherwise
9 heal. (McCoy-Winston Decl. at ¶ 8; Hammack Decl., Ex. A at 14 (McCoy-Winston Dep. at
10 94:9-14).) However, Plaintiff's injury failed to resolve, and on February 9, 2017, Plaintiff
11 reported the injury to UPS management and sought treatment from his care provider.
12 (McCoy-Winston Decl. at ¶ 8; Hammack Decl., Ex. A at 12-13 (McCoy-Winston Dep. at
13 92:15-93:7).) Plaintiff's care provider diagnosed him with a chest contusion and recommended
14 that he not work to allow his injury time to heal. (McCoy-Winston Decl. at ¶ 8.) Plaintiff did not
15 return to work until February 18, 2017.³ (*Id.*)

16 Upon learning of Plaintiff's injury, on February 10-11, 2017, UPS Division Manager
17 Geoffrey McKenzie sent emails to several UPS employees requesting that Plaintiff's injury be
18 investigated. (Hammack Decl., Exs. L (dkt. # 68-12) at 2 ("We need to get Security, Labor, and
19 Risk Management involved with this injury. We will NOT let this go to the wayside, period!"),
20 Q (dkt. # 68-17) at 3 ("We need to get some traction on this ASAP . . . this sort should not be

21
22 ³ While working for UPS in August 2015, Plaintiff previously sustained a rotator cuff injury that required
23 surgery and resulted in a workers' compensation claim and leave of absence from November 4, 2015, to
October 31, 2016. (McCoy-Winston Decl. at ¶ 13; Hammack Decl., Ex. A at 6 (McCoy-Winston Dep. at
37:6-25).) Plaintiff also previously injured his hand while working for UPS on May 7, 2012 but returned
to work on May 18, 2012. (Hammack Decl., Ex. P (dkt. # 68-16) at 2-4.)

1 charged a [loss time] injury.”.) Mr. McKenzie sent follow up emails on February 20-21, 2017,
2 continuing to express significant concern about the need to investigate Plaintiff’s injury.
3 (Victorian Decl., Ex. C (dkt. # 65-3) at 22 (“I cannot express my passion for this and need for
4 you to dig into this injury.”), 24 (“We need to get some teeth in this and question every aspect of
5 this alleged injury . . . we should not be eating the charge for this injury.”).)

6 Mr. McKenzie and UPS Seattle Hub Manager Jason Hell both testified that UPS
7 investigates employee injuries for the purpose of determining the root cause of the injury from a
8 safety perspective for preventative purposes. (Victorian Decl., Exs. C at 5 (McKenzie Dep. at
9 33:13-24), E (dkt. # 65-5) at 6-7 (Hell Dep. at 43:21-44:15).) Mr. McKenzie additionally
10 testified that UPS managers are reviewed annually and that one metric impacting their review is
11 based on the frequency of injuries to employees per hours worked. (Hammack Decl., Ex. B (dkt.
12 # 68-2) at 10-11 (McKenzie Dep. at 68:9-20, 70:11-71:2).) Plaintiff’s Supervisor Cory
13 Christopher testified that UPS tracks workers’ compensation claims as a line item in its cost
14 statements, that such claims are paid out of a hub’s costs across the year, but that he has never
15 received a review on the basis of such costs exceeding the hub’s budget. (Hammack Decl., Ex. D
16 (dkt. # 68-4) at 5-6 (Christopher Dep. 73:13-74:10); Second Victorian Decl., Ex. C (dkt. # 73-3)
17 at 6-7, 10 (Christopher Dep. at 75:13-76:10, 82:10-20).) UPS Business Manager Rick Aholelei
18 testified that UPS division managers regularly compete amongst divisions to keep injuries down
19 and were incentivized to do so by being awarded monthly celebrations. (Hammack Decl., Ex. E
20 (dkt. # 68-5) at 5 (Aholelei Dep. at 46:3-23).)

1 On February 11, 2017, Plaintiff was interviewed by Mr. Hell regarding his injury and
 2 pictures were taken of Plaintiff standing next to a chute handle.⁴ (McCoy-Winston Decl. at
 3 ¶¶ 9-10; Victorian Decl., Ex. B (dkt. # 65-2) at 10; Hammack Decl., Ex. R (dkt. # 68-18) at 3-4.)
 4 Both Mr. Hell, who previously worked as loader/unloader for UPS, and Mr. Sullivan testified
 5 that they had never heard of an employee injuring themselves on a chute handle. (Victorian
 6 Decl., Exs. E at 22-23 (Hell Dep. at 96:13-22), I (dkt. # 65-9) at 7 (Sullivan Dep. at 46:12-16).)
 7 As part of its investigation, UPS Labor Manager Thad Collins tasked UPS employees to
 8 investigate any recent police activity involving trauma to the chest that may have occurred
 9 relative in time to when Plaintiff suffered his injury. (Victorian Decl., Ex. C at 17-18.) Based on
 10 UPS's investigation, UPS concluded Plaintiff's injury could not physically have occurred in the
 11 manner Plaintiff indicated based on his height and the height of the chute handle. (Hammack
 12 Decl., Exs. Q at 2-5, R at 2-4, S (dkt. # 68-19) at 2; Victorian Decl., Exs. E at 22-23 (Hell Dep. at
 13 100:25-101:11), F (dkt. # 65-6) at 5-6 (Christopher Dep. at 68:21-69:19).)

14 On February 24, 2017, UPS Claims Manager Gallagher Basset issued a letter denying
 15 Plaintiff's workers' compensation claim noting, "there is no proof of a specific injury at a
 16 definite time and place in the course of employment." (Hammack Decl., Ex. U (dkt. # 68-21) at
 17
 18

19 ⁴ The parties disagree as to which precise chute handle allegedly injured Plaintiff. Plaintiff argues that he
 20 was injured by the chute handle located at Door 55. (Pl.'s Resp. at 3, 12, 18; *see also* McCoy-Winston
 21 Decl. at ¶ 7.) Defendants contend that Plaintiff was either injured by the chute handle located at Door 49
 22 or 52, but that it is otherwise immaterial because Plaintiff failed to provide evidence that any chute handle
 23 could reach low enough to connect with his chest. (Def.'s Mot. at 6; Def.'s Reply at 3, 7-8; *see also*
 Victorian Decl., Ex. F at 5-6 (Christopher Dep. at 77:24-78:22).) UPS additionally submitted work orders
 that demonstrate the only chute handles reported as broken in proximity to when Plaintiff's injury
 occurred were located at Door 38 and Door 52, both of which UPS claims were repaired before Plaintiff
 allegedly injured himself, and that there is no evidence in the record that the handle at Door 55 was
 broken. (Def.'s Reply at 7 (citing Victorian Decl., Ex. B at 6).)

2.) As a result, on March 2, 2017, the Washington Department of Labor & Industries (“DOLI”) denied Plaintiff benefits.⁵ (Victorian Decl., Ex. G (dkt. # 65-7) at 4-5 (Hell Decl. at ¶ 18).)

On March 16, 2017, Mr. McKenzie scheduled a meeting with Plaintiff where he was informed that he was suspended pending UPS’s investigation. (McCoy-Winston Decl. at ¶ 11; Victorian Decl., Ex. G at 5 (Hell Decl. at ¶ 20).) The next day, on March 17, 2017, Plaintiff was terminated by UPS on the basis of “proven dishonesty” for raising a false claim of injury. (McCoy-Winston Decl. at ¶ 12, Ex. A (dkt. # 70-1) at 2.) However, per the record that same day, Mr. Hell sent an email to Mr. McKenzie stating that he “had to adlib on this, there was not a proven dishonestly w/l on the site.”⁶ (Hammack Decl., Ex. W (dkt. # 68-23) at 2.)

On March 21, 2017, Plaintiff filed a grievance through his union regarding his termination. (Hammack Decl., Ex. EE (dkt. # 68-31) at 2.) Plaintiff’s grievance was later withdrawn due to Plaintiff’s lack of participation, and his termination was upheld on April 13, 2017. (Victorian Decl. (dkt. # 65-1), Exs. A at 15, B at 5.) Plaintiff alleges he was not aware of a hearing to be held on his grievance because he did not hear from his union representative “for a while” after his termination. (McCoy-Winston Decl. at ¶ 14.)

B. Procedural Background

On May 22, 2020, UPS removed this matter from the King County Superior Court. (Not. of Removal (dkt. # 1).) Plaintiff’s complaint alleges two causes of action: (1) wrongful

⁵ On March 28, 2017, DOLI granted Plaintiff benefits on reconsideration. (Hammack Decl., Ex. X (dkt. # 68-24) at 2-4.) Plaintiff’s physician submitted that he had made an error on a form submitted to DOLI that failed to note that Plaintiff’s diagnosis was caused by a specific injury on a more probable than not basis. (*Id.*, Ex. V (dkt. # 68-22) at 2.) On April 20, 2017, DOLI reversed their reconsideration and denied Plaintiff benefits based on additional evidence submitted by UPS. (*Id.*, Ex. Y (dkt. # 68-25) at 2.) On October 24, 2017, DOLI again reversed its decision and granted Plaintiff benefits on reconsideration. (*Id.*, Ex. BB (dkt. # 68-28) at 2.)

⁶ There is no clarification in the record as to the meaning of “w/l” in Mr. Hell’s email. At oral argument, UPS asserted the term meant “written letter.” (*See* dkt. # 77.)

1 discharge, in violation of public policy; and (2) retaliation, in violation of RCW 51.48.025.

2 (Compl. (dkt. # 1-1) at 3.) On May 29, 2020, UPS filed its Answer. (Answer (dkt. # 9).)

3 On January 10, 2022, UPS filed the instant Motion. (Def.'s Mot.) On February 7, 2022,
4 after an extension of time, Plaintiff filed his response. (Pl.'s Resp.) On February 11, 2022, UPS
5 filed its reply, which contained motions to strike requesting the Court to strike photographs and a
6 portion of two declarations submitted with Plaintiff's Response. (Def.'s Reply.) On February 21,
7 2022, Plaintiff filed a Surreply. (Pl.'s Surreply (dkt. # 75).) This matter is now ripe for the
8 Court's review.

9 III. DISCUSSION

10 UPS argues it had a legitimate, non-discriminatory basis for terminating Plaintiff
11 following a finding of "proven dishonesty," which was in violation of UPS policy and Plaintiff's
12 collective bargaining agreement.⁷ (Def.'s Mot. at 10.) UPS contends its internal investigation
13 revealed that the chute handle, even at its lowest point, was too high to strike Plaintiff in his
14 chest and that Plaintiff failed to otherwise demonstrate how his alleged injury occurred in the
15 manner he claimed. (*Id.* at 10-11.) Plaintiff counters summary judgment should not be granted
16 because he has established prima facie cases on both of his claims and there is sufficient

17
18
19 ⁷ UPS additionally provided brief argument that because Plaintiff's claims of pretext turn on "proven
20 dishonesty" as a legitimate non-retaliatory reason and term of art in his collective bargaining agreement,
21 his claims are preempted by § 301 of the Labor Management Relations Act. (Def.'s Mot. at 18-19.) But
22 UPS fails to demonstrate how Plaintiff's claims are substantially dependent on an interpretation of
23 "proven dishonesty," as defined by Plaintiff's CBA, for § 301 preemption to apply. *See Curtis v. Irwin*
Indus., Inc., 913 F.3d 1146, 1153 (9th Cir. 2019) (in determining whether a plaintiff's state law right is
substantially dependent on analysis of a CBA, claims are only preempted to the extent there is an active
dispute over "the meaning of contract terms." (citation omitted)). The mere need to "look to," "consider,"
"refer to," or "apply" a CBA does not result in § 301 preemption of a plaintiff's state law claims. *McCray*
v. Marriott Hotel Servs., Inc., 902 F.3d 1005, 1011, 1013 (9th Cir. 2018) (citing *Balcorta v. Twentieth*
Century-Fox Film Corp., 208 F.3d 1102, 1108 (9th Cir. 2000)).

1 evidence in the record that demonstrates UPS's basis for his termination was pretext. (Pl.'s Resp.
2 at 2-3, 17-21.)

3 **A. Summary Judgment**

4 Summary judgment is appropriate when the "movant shows that there is no genuine
5 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
6 Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party is
7 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
8 showing on an essential element of his case with respect to which he has the burden of proof.
9 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden
10 of showing the Court "that there is an absence of evidence to support the nonmoving party's
11 case." *Id.* at 325. The moving party can carry its initial burden by producing affirmative evidence
12 that negates an essential element of the nonmovant's case or by establishing that the nonmovant
13 lacks the quantum of evidence needed to satisfy its burden at trial. *Nissan Fire & Marine Ins.*
14 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the
15 nonmoving party to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co. v.*
16 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court must draw all reasonable inferences in
17 favor of the nonmoving party. *Id.* at 585-87.

18 Genuine disputes are those for which the evidence is such that a "reasonable jury could
19 return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 257. It is the nonmoving party's
20 responsibility to "identify with reasonable particularity the evidence that precludes summary
21 judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoted source omitted). The
22 Court need not "scour the record in search of a genuine issue of triable fact." *Id.* (quoted source
23 omitted); *see also* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but

1 it may consider other materials in the record.”). Nor can the nonmoving party “defeat summary
2 judgment with allegations in the complaint, or with unsupported conjecture or conclusory
3 statements.” *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003); *see*
4 *McElyea v. Babbitt*, 833 F.2d 196, 197-98 n.1 (9th Cir. 1987) (per curiam).

5 **B. Motions to Strike**

6 First, UPS moves to strike several photographs Plaintiff submitted in his response to
7 Defendant’s Motion. (Def.’s Reply at 1-4.) The photographs submitted were taken on May 21,
8 2021 by Jaylee Harkness, Plaintiff’s counsel’s legal assistant, and concern the posture and
9 condition of the chute handles, the placement of the chute handles in relation to the catwalk, the
10 location where Plaintiff contends his injury occurred, and the position of the load stands.
11 (Harkness Decl. (dkt. # 69) at ¶ 2, Exs. A (dkt. # 69-1) at 2-4, B (dkt. # 69-2) at 2-4, C (dkt.
12 # 69-3) at 2-4, D (dkt. # 69-4) at 2-6, E (dkt. # 69-5) at 2-5, F (dkt. # 69-6) at 2.)

13 UPS argues that Plaintiff failed to produce, disclose, or otherwise supplement previous
14 discovery, to disclose the photographs, and therefore, they should not be considered. (Def.’s
15 Reply. at 1-3.) UPS additionally moves to strike a statement included in Ms. Harkness’s
16 declaration about the condition of the chute handles and a portion of Plaintiff’s declaration that
17 UPS alleges contradicts his previous testimony regarding whether he was on a load stand when
18 he injured himself. (*Id.* at 3-4.)

19 Plaintiff argues UPS’s motions to strike should be denied because no discovery was
20 propounded that required supplementation, the existence of the photographs was known to UPS,
21 and because some of the photographs were previously provided during Mark Sullivan’s
22 deposition. (Pl.’s Surreply at 3.) Plaintiff additionally argues that Ms. Harkness’s statement about
23

1 the condition of the chute equipment should not be stricken because it was offered only as a
 2 means to categorize the photos. (*Id.*)

3 UPS's request to strike Plaintiff's submitted photographs is denied. Federal Rule of
 4 Procedure 26(a) requires parties to disclose all documents and tangible things that the disclosing
 5 party has in its possession, custody, or control that may be used to support its claims or defenses.
 6 Fed. R. Civ. P. 26(a)(1)(a)(ii). Generally, "[i]f a party fails to provide information or identify a
 7 witness as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to
 8 supply evidence on a motion" Fed. R. Civ. P. 37(c)(1). However, pertinent to the instant
 9 matter, under Federal Rule of Civil Procedure 26(e)(1):

10 A party who has made a disclosure under [Fed R. Civ. P. 26(a)]—or who has
 11 responded to an interrogatory, request for production, or request for admission—
 12 must supplement or correct its disclosure or response . . . in a timely manner if the
 13 party learns that in some material respect the disclosure or response is incomplete
 14 or incorrect, *and if the additional or corrective information has not otherwise been
 15 made known to the other parties during the discovery process*

16 (emphasis added).

17 Here, it is clear from the record that UPS was aware of the photographs because Rebecca
 18 Shelton, local counsel for UPS, was present when they were taken. (*See* Second Hammack Decl.
 19 (dkt. # 76) at ¶ 6; Exs. H (dkt. # 76-3) at 2-3, JJ (dkt. # 76-4) at 2.) Some of the photographs
 20 were also previously provided and disclosed to UPS during Mr. Sullivan's deposition. (*Id.* at ¶ 7,
 21 Ex. KK (dkt. # 76-5) at 2-10.) Because the photographs were made known to UPS during the
 22 discovery process, Plaintiff did not have a duty to supplement its previous disclosure under Rule
 23 26(a).⁸

⁸ Nevertheless, Plaintiff's submitted photographs fail to create a genuine issue of material fact as to the condition or positioning of the chute handles because they fail to demonstrate the condition or positioning of the chute handles at the time Plaintiff claims that he was injured.

1 Next, UPS's request to strike a portion of Plaintiff's declaration is denied. Plaintiff's
2 submission in his declaration that he was on a load stand when he was injured does not
3 contradict his prior testimony. (*Compare* McCoy-Winston Decl. at ¶ 7 *with* Hammack Decl., Ex.
4 A at 16-17 (McCoy-Winston Dep. at 125:20-126:3).) In fact, Plaintiff explicitly testified to using
5 a load stand when he was injured. (*See* Hammack Decl., Ex. A at 16-17 (McCoy-Winston Dep.
6 at 125:20-126:3).) Though Plaintiff testified at his deposition, by reading the written statement
7 he provided to UPS at the time he was injured (Hammack Decl., Ex. A at 5 (McCoy-Winston
8 Dep. at 33:7-13)), Plaintiff's elaboration on the manner in which he was injured does not
9 demonstrate he contradicted prior testimony that merely repeats a previous written statement.

10 However, Ms. Harkness's statement regarding the condition of the chute handles should
11 be stricken. The Federal Rules of Evidence allow for opinion testimony from both lay and expert
12 witnesses. Fed. R. Evid. 701, 702. "It is necessary that a lay witness's opinions are based
13 upon . . . direct perception of the event, are not speculative, and are helpful to the determination
14 of factual issues before the jury." *United States v. Freeman*, 498 F.3d 893, 905 (9th Cir.
15 2007) (citation and internal quotations omitted). Here, Ms. Harkness is Plaintiff's counsel's legal
16 assistant and has not testified to possessing any measure of technical knowledge related to the
17 condition of UPS's equipment or the chute handles. (*See* Harkness Decl. at ¶ 1.) Ms. Harkness's
18 statement also does not appear to be helpful to determining a fact at issue in this case. *See* Fed.
19 R. Evid. 701(b).

20 C. Wrongful Discharge

21 Next, UPS argues that Plaintiff's wrongful discharge claim should be dismissed because
22 he fails to demonstrate UPS was motivated by retaliatory animus, that UPS's proffered reason
23 for his termination was pretextual, or that his pursuit of workers' compensation benefits was a

1 substantial factor motivating his termination. (Def.'s Mot. at 11-17.) Plaintiff counters he has
2 established a prima facie case for wrongful discharge, and that there is sufficient evidence of
3 pretext in the record because UPS's investigation was not to correct a safety hazard, but to serve
4 as a means to terminate his employment. (Pl.'s Resp. at 3, 20-21.)

5 "The tort for wrongful discharge in violation of public policy is a narrow exception to
6 the at-will doctrine." *Erickson v. Biogen, Inc.*, 417 F.Supp.3d 1369, 1386 (W.D. Wash. 2019)
7 (citing *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258 (2015)). Wrongful discharge in
8 violation for public policy has generally been limited to four situations: "(1) where employees
9 are fired for refusing to commit an illegal act; (2) where employees are fired for performing a
10 public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising
11 a legal right or privilege, such as filing workers' compensation claims; and (4) where employees
12 are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing." *Gardner v.*
13 *Loomis Armored, Inc.*, 128 Wn.2d 931, 936 (1996) (citing *Dicomes v. State*, 113 Wn.2d 612, 618
14 (1989)).

15 In Washington, to prevail on a claim for wrongful discharge in violation of public policy,
16 "a plaintiff must demonstrate that his or her discharge may have been motivated by reasons that
17 contravene a clear mandate of public policy." *Martin v. Gonzaga University*, 191 Wn.2d 712,
18 723 (2018) (citation and internal quotations omitted). Under a burden shifting framework, the
19 plaintiff must first make a prima facie showing that: (1) their discharge was motivated by reasons
20 that contravene a clear mandate of public policy; and (2) "the public-policy-linked conduct was a
21 'significant factor' in the decision to discharge" him. *Id.* at 725 (quoting *Wilmot v. Kaiser*
22 *Aluminum & Chem. Corp.*, 118 Wn.2d 46, 75 (1991)). A plaintiff can make such a demonstration
23 through circumstantial evidence, which includes proximity in time between the claim and his

1 firing, in addition to satisfactory work performance and evaluations. *Id.*; *Wilmot*, 118 Wn.2d at
2 69-70.

3 If the plaintiff makes this prima facie showing of wrongful termination, the burden shifts
4 to “the employer to articulate a legitimate nonpretextual nonretaliatory reason for the
5 discharge.” *Martin*, 191 Wn.2d at 725-26. If the employer meets this burden of production, then
6 the burden swings back to the plaintiff.⁹ *Id.* at 726. The plaintiff must then show that the reason
7 was “pretextual, or by showing that although the employer’s stated reason is legitimate, the
8 [public-policy-linked conduct] was nevertheless a substantial factor motivating the employer to
9 discharge the worker.” *Id.* (citation and quotations omitted).

10 In this case, Plaintiff has properly alleged a prima facie case that he was discharged for
11 reasons that contravene a clear mandate of public policy—his filing of a workers’ compensation
12 claim—and that it was a significant factor in UPS’s decision to terminate his employment.
13 Plaintiff’s termination was proximate in time to his injury. Immediately upon learning of
14 Plaintiff’s claim of injury, UPS began an investigation that ultimately determined Plaintiff
15 should be fired on the basis that he was dishonest about his injury. Though there appears to be
16 some evidence in the record as to Plaintiff’s “high level of lateness and absenteeism” (Victorian
17 Decl., Ex. C at 17-18), Plaintiff was employed with UPS for approximately eight years at the
18 time of his termination and there is no evidence that UPS sought to terminate him due to his
19 attendance record. (*See* Victorian Decl., Ex. C at 17-18; Hammack Decl., Ex. A at 7-10
20 (McCoy-Winston Dep. at 50:11-16, 50:18-21, 52:2-4, 70:18-25).) As such, it appears that
21 Plaintiff had been performing to UPS’s satisfaction up until his injury claim arose.
22

23 ⁹ The employer’s burden is a burden of production, and not persuasion. *Martin*, 191 Wn.2d at 725-26. The
employer must produce relevant admissible evidence of another motivation but need not do so by a
preponderance of evidence. *Id.* (internal citations and quotations omitted).

1 Next, the burden shifts to UPS to produce evidence of legitimate, nonretaliatory reason
2 for the discharge. Here, UPS has produced evidence that Plaintiff was fired for “proven
3 dishonesty” because Plaintiff’s injury could not have occurred as he alleged based on his height,
4 and the height and condition of the chute handles. (Hammack Decl., Exs. Q at 2-5, R at 2-4, S at
5 2; Victorian Decl., Exs. E at 22-23 (Hell Dep. at 100:25-101:11), F at 5-6 (Christopher Dep. at
6 68:21-69:19).)

7 Given UPS’s proffered reason, the burden shifts back to Plaintiff to show UPS’s reason is
8 pretextual, or that despite UPS’s legitimate reason to fire him, the public-policy-linked conduct
9 nevertheless was a substantial factor motivating his discharge. A plaintiff satisfies his burden to
10 show pretext by offering sufficient evidence to create a genuine dispute of material fact that
11 either: (1) the defendant’s stated reason is false; or (2) although the defendant’s reason is
12 legitimate, retaliation was still a substantial factor motivating the adverse employment action.
13 *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 446-47 (2014) (citation omitted). An employee does
14 not need to disprove each of the employer’s articulated reasons to satisfy the pretext burden of
15 production. *Id.* at 447. “The focus of a pretext inquiry is whether the employer’s stated reason
16 was honest, not whether it was accurate, wise, or well-considered.” *Shokri v. Boeing Co.*, 311
17 F.Supp.3d 1204, 1221 (W.D. Wash. 2018) (citation and internal quotations omitted).

18 Here, Plaintiff’s alleges, *inter alia*, that UPS conducted a flawed investigation of
19 Plaintiff’s injury, Plaintiff’s injury could still happen in the manner he alleges based on the
20 condition of the chute handles, and that the UPS manager and supervisors tasked with the
21 investigation were financially motivated to reduce loss time claims. (*See* Pl.’s Resp. at 17-20.)
22 Based on the record before the Court, Plaintiff has provided sufficient evidence demonstrating
23 genuine issues of material fact concerning whether UPS’s proffered reason of “proven

1 dishonesty” was pretext. First, though UPS claims its investigation was primarily focused on
2 determining the root cause of Plaintiff’s injury, it is clear from the record and from the nature of
3 the investigation conducted that UPS officials had additional considerations in mind.
4 Specifically, the record evinces that UPS officials were unambiguously concerned about the
5 potential impact of Plaintiff’s injury being charged as a “loss time” injury and about otherwise
6 “eating the charge” for his injury. (*See* Hammack Decl., Ex. Q at 3; Victorian Decl., Ex. C at 24.)
7 And rather than merely investigate how the chute handle may have injured Plaintiff to determine
8 if a safety issue existed, UPS sought out information on recent police activity involving chest
9 trauma to determine the veracity of his claim. (*See* Victorian Decl., Ex. C at 17-18.) It therefore
10 appears UPS sought out reasons to conclude that “proven dishonesty” occurred rather than
11 merely seek out to uncover any potential safety threats after Plaintiff’s injury.

12 Second, there are genuine issues of material fact throughout the record relating to
13 whether Plaintiff’s injury could have occurred in the manner alleged. As noted above, UPS has
14 provided evidence that Plaintiff’s injury could not have occurred due to his height relative to the
15 height of the chute handles and that there is no work order history of a malfunctioning chute
16 handle at the time of Plaintiff’s injury. (*See* Hammack Decl., Exs. Q at 2-5, R at 2-4, S at 2;
17 Victorian Decl., Exs. B, at 6, E at 22-23 (Hell Dep. at 100:25-101:11), F at 5-6 (Christopher Dep.
18 at 68:21-69:19).) At the same time, the record demonstrates there were known issues, as noted by
19 Mr. Sullivan and Plaintiff’s coworkers, with the chute handles being regularly broken or leaking
20 hydraulic fluid such that they could be hanging in a lower position. (*See* McCoy-Winston Decl.
21 at ¶ 7; Hammack Decl., Exs. F at 13-15 (Sullivan Dep. at 39:8-40:10, 43:1-20), I at 2, J at 2.)
22 There is also some question raised by the evidence as to how the presence of a load stand may
23 have affected Plaintiff’s ability to strike a chute handle with his chest. Moreover, despite UPS’s

1 position that Plaintiff's "proven dishonesty" was the basis for his termination, Mr. Hell's email
2 to Mr. McKenzie indicating that "there was not a proven dishonesty w/l on site" further clouds
3 the record on Plaintiff's termination. (Hammack Decl., Ex. W at 2.) Despite UPS's proffered
4 interpretation at oral argument, there is no clear explanation in the record from Defendant as to
5 the meaning of Mr. Hell's comment.

6 Finally, there is disputed evidence in the record related to whether Plaintiff's termination
7 may have been financially motivated. Mr. McKenzie and Mr. Aholelei both testified that they
8 were incentivized in some form or manner to minimize employee injuries or "loss time" claims
9 and, as documented previously, it is clear that this was a major concern for Mr. McKenzie. (*See*
10 Hammack Decl., Ex. B at 10-11 (McKenzie Dep. at 68:9-20, 70:11-71:2), Ex. E at 5 (Aholelei
11 Dep. at 46:3-23).) On the other hand, Mr. Christopher testified that though workers'
12 compensation claim costs are accounted for in a hub's budget, UPS managers are not held
13 financially responsible or otherwise reviewed for such costs. (Hammack Decl., Ex. D at 5-6
14 (Christopher Dep. 73:13-74:10).) Given this record, the Court additionally finds there are
15 genuine issues of material fact concerning the incentive to Plaintiff's managers in keeping
16 employee injuries and "loss time" claims to a minimum and whether this may have provided
17 UPS motivation to terminate him from his employment.

18 Accordingly, Plaintiff has provided sufficient evidence to provide a basis for a reasonable
19 juror to conclude that UPS's stated reason of "proven dishonesty" was pretext.

20 **D. Workers' Compensation Violation**

21 Finally, Plaintiff argues that after filing for workers' compensation benefits, he was
22 immediately investigated and fired, which establishes a prima facie case of retaliation for filing a
23 workers' compensation claim. (Pl.'s Resp. at 16-17.) Under Washington law, an employee

1 cannot be discharged or discriminated against for filing a workers' compensation claim. RCW
2 52.48.025(1). To establish a prima facie case of a workers' compensation violation, the plaintiff
3 must demonstrate: (1) he exercised his workers' compensation rights; (2) he was terminated; and
4 (3) a causal connection between the exercise of the legal right and the discharge. *Anica v. Wal-*
5 *Mart Stores, Inc.*, 120 Wn. App. 481, 490-91 (2004). "Proximity in time between the protected
6 activity and the employment action when coupled with evidence of satisfactory work
7 performance supports an assertion of retaliatory motive." *Id.* at 491 (citing *Wilmot*, 118 Wn.2d at
8 69.)

9 In recognition of the difficulty of proving motive in such cases, Washington courts allow
10 an employee to establish the causation element by merely showing he filed a workers'
11 compensation claim, that the employer had knowledge of the claim, and that the employee was
12 discharged. *Anica*, 120 Wn. App. at 491. Once a prima facie showing is made, the burden then
13 shifts to the employer who must offer a legitimate reason for the discharge that is not pretext or
14 retaliation. *Id.* at 492. If the employer's burden is met, it then shifts back to the employee to
15 show the reason offered by the employer was pretext or by showing that although legitimate, the
16 employee's pursuit of workers' compensation benefits was a substantial factor motivating the
17 employer to fire the employee. *Id.*

18 Here, Plaintiff has established a prima facie case for workers' compensation violation
19 under RCW 51.48.025. The first two prongs are met as it is clear Plaintiff filed a workers'
20 compensation claim and that his employment was subsequently terminated by UPS.
21 Furthermore, there is evidence of a causal connection between Plaintiff's claim and termination
22 because shortly after UPS discovered Plaintiff had filed a claim, UPS immediately began an
23 investigation and determined termination was appropriate. Finally, for the same reasons

1 considered previously in addressing Plaintiff's wrongful discharge claim, the Court finds genuine
2 issues of material fact exist as to UPS's motivation to terminate him and whether its proffered
3 reason was pretext for his claim pursuant to RCW 51.48.025.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court hereby orders:

6 (1) Defendant's Motions to Strike (dkt. # 72) are GRANTED in part and DENIED in
7 part. Defendant's Motion to Strike the portion of Ms. Harkness's declaration relating to the
8 condition of the chute handle is GRANTED. Defendant's Motion to Strike Plaintiff's submitted
9 photographs and the requested portion of Plaintiff's declaration is DENIED.

10 (2) Defendant's Motion (dkt. # 64) is DENIED.

11 (3) The Clerk is directed to send a copy of this Order to the parties.

12 Dated this 15th day of March, 2022.

13
14 

15 MICHELLE L. PETERSON
16 United States Magistrate Judge
17
18
19
20
21
22
23